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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92049154
Party	Defendant Ole Mexican Foods, Inc.
Correspondence Address	Ole Mexican Foods, Inc. 6585 Crescent Drive Norcross, GA 30071 UNITED STATES
Submission	Motion to Dismiss - Rule 12(b)
Filer's Name	Paul S. Owens
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Date	05/19/2008
Attachments	Motion to Dismiss.pdf ( 4 pages )(13243 bytes )

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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In the Matter of Trademark Registration  
No.: 2,987,937

For the Mark: VEROLÉ

Date of Registration: August 23, 2005

Orange Bang, Inc.,

Petitioner,

vs.

Cancellation No.: 92049154

Olé Mexican Foods, Inc.,

Respondent.

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**MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF REGISTRANT’S MOTION TO DISMISS  
THE PETITION FOR CANCELLATION FOR LACK OF STANDING**

This is a motion by Registrant-Olé Mexican Foods, Inc. (“Olé”) to dismiss the Petition herein on the grounds that Petitioner has failed to state a claim upon which relief may be granted and has failed to allege facts sufficient to show standing to bring the within cancellation action.

**I. The Petitioner Has Failed to Allege Standing.**

In order to maintain a Petition for Cancellation, the Petitioner “must set forth a short and plain statement showing why the Petitioner believes he, she or it is or will be damaged by the registration,” and “state the grounds for cancellation.” 37 C.F.R. § 2.112(a).

Any person who believes it is or will be damaged by registration of a mark has standing to file a Petition for Cancellation, but the Petitioner must allege facts sufficient to show a “real interest” in the proceeding, and a “reasonable basis for its belief of damage.” TBMP § 309.03(b).

A real interest in the proceeding and a reasonable belief of damage may be found, for example, where Petitioner pleads (and later proves):

“A claim of likelihood of confusion that is not wholly without merit; Plaintiff has been refused registration of its mark because of defendant’s registration, or has been advised that it will be refused registration when defendant’s application matures into a registration, or has a reasonable belief that registration of its application will be refused because of defendant’s registration.”

TBMP § 309.03(b).

The Petition herein is utterly devoid of any allegations showing Petitioner’s standing to bring the within cancellation. First, the Petition does not contain even a bare allegation that Olé’s above-captioned registered mark so resembles Petitioner’s mark as to be likely, when applied to Olé’s goods to cause confusion with Petitioner’s goods, much less any allegation

that the parties' goods are related, that the parties' goods travel through the same channels of trade, that the parties goods are sold to the same classes of purchasers, and so on.

Nor has Petitioner shown that its application has been refused registration because of the above-captioned registration. In fact, Petitioner's allegations show the opposite. At ¶ 6 of the Petition herein, Petitioner alleges that its Application No. 78/738,452 for the word mark OLÉ has been blocked by several registered marks owned by Olé, but the above-captioned registration is not one of the registrations that has been cited by the Examining Attorney.

Nor has Petitioner alleged any other facts showing its standing to bring the within Petition to Cancel.

In these circumstances, the Petition should be cancelled for failure to state a claim and/or allege sufficient facts to show standing. See, e.g., Liberty Trouser Co., Inc. v. Liberty & Co., Ltd., 222 U.S.P.Q. 357 (TTAB 1983).

Dated: May 19, 2008

Respectfully submitted,

/paul s. owens/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Motion to Dismiss has been served upon Aaron T. Borrowman, Esq., attorney of record for the Petitioner, at Kelly Lowry & Kelley, LLP, 6320 Canoga Hills, California 91367, the address designated by said attorney for that purpose, by causing to be mailed a true copy thereof in a sealed envelope, postage prepaid, and deposited with the United States Postal Service as first-class mail on Monday, May 19, 2008.

/paul s. owens/

Paul S. Owens, Esq.

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that the above Motion to Dismiss Petition for Cancellation No. 92049118 by Olé Mexican Foods, Inc. is being electronically filed with the Trademark Trial and Appeal Board through the Electronic System for Trademark Trials and Appeals ("ESTTA") on Monday, May 19, 2008.

/paul s. owens/